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Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1997

ALBERT A. FLIBOTTE,
Petitioner,

v.

PENNSYLVANIA TRUCK LINES, INC.,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

MALCOLM J. BARACH*
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77 pp

QUESTION PRESENTED

Should this Court grant certiorari to review the decision of the United States Court of Appeals for the First Circuit that affirmed the ruling of a federal district court judge -- who was not the trial judge in this case and whose ruling was contrary to that of the trial judge -- that stripped the plaintiff of the jury verdict that he had received and that dismissed his case, and, in so affirming that ruling, did said courts, without benefit and review of the trial transcripts, deny plaintiff his due process and trial rights as guaranteed by the Fifth, Fourteenth and Seventh Amendments of the Constitution of the United States and did said courts misconstrue and misapply federal labor law to the prejudice and substantiai detriment of the plaintiff?

LIST OF PARTIES TO THE

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All parties appear in the caption of the case on the cover page.

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The opinion of the United States Court of Appeals for the First Circuit that gives rise to this petition and the opinion of the federal district court that triggered the appeal to the First Circuit are contained in the Appendix.

JURISDICTION

On January 17, 1995 the United States District Court for the District of Massachusetts issued a Memorandum and Order that threw out the jury verdict in favor of the plaintiff and dismissed plaintiff's case. That ruling was affirmed by the United States Court of Appeals for the First Circuit on December 10, 1997, which also denied a petition for rehearing and suggestion for rehearing en banc on January 20, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES AND RULES

INVOLVED IN THIS CASE

(a) Fifth Amendment, United States Constitution:

> . . . [N]or be deprived of life, liberty, or property, without due process of law; . . .

(b) Fourteenth Amendment, United States Constitution:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

(c) Seventh Amendment, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States,

than according to the rules of the common law.

(d) Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1994), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . .

(e) Federal Rules of Civil Procedure, Rule 50, 28 U.S.C.A., provides:

> (1) If during a trial by jury a party has been fully heard with respect to an issue....the court may grant a motion for judgment as a

matter of law against that party on any claim

. . . .

(f) Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A., provides:

(d) If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion...shall if practicable ascertain what material facts exist

. . . .

STATEMENT OF THE CASE

Plaintiff/Appellant Albert A. Flibotte was fired from the job he had held for nearly 30 years by Defendant/ Appellee Pennsylvania Truck Lines, Inc., on March 18, 1987. A subsequent seven-count complaint citing various wrongful conduct committed by the defendant was filed in Suffolk Superior Court in Boston, Massachusetts. That complaint was removed by defendant to the federal district court in Boston and led to an eight-day jury trial before Judge David S. Nelson.

During that trial, which began on October 15, 1991, there was substantial evidence presented to persuade the jurors that, among other things, that the plaintiff had been told to take a physical examination in a filthy, rat-infested trailer van, where the drawing of blood was planned within the confines of rat infestation. Trial testimony also made clear that the plaintiff never refused to take a drug test, which

defendant had asserted was the grounds for termination. (A hearing before a review examiner of the Massachusetts Division of Employment Security on September 10, 1987 already had established that Flibotte had never refused to take a drug test and the physical site was rat infested and posed a health hazard.)

Prior to trial defendant had sought to have the case dismissed on grounds that federal labor law, more specifically, Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1994), had preempted defendant's state law claims. Judge Nelson denied defendant's motion, and when defendant raised these preemption arguments again via motions for a directed verdict during trial, Judge Nelson again rejected them.

The jury verdict in favor of plaintiff on three counts, negligence, negligent infliction of emotional distress and intentional infliction of emotional distress, with an award of

$625,000.00 in damages, was challenged by defendant, which filed a Motion for Judgment Notwithstanding the Verdict, or, Alternatively for a New Trial or to Reduce the Damages on November 21, 1991. That motion and plaintiff's opposition then lay dormant until the case was reassigned to Judge Nancy Gertner on May 20, 1994. Prior to the reassignment, Judge Nelson had become ill and the defendant had filed a Suggestion of Bankruptcy (Chapter 11).

Judge Gertner subsequently granted the defendant's motion. She did so without first seeing or reviewing the trial transcript, which defendant had not provided when it filed its motion, and her memorandum contained conclusions drawn that were directly contrary to those rendered by Judge Nelson.

The plaintiff appealed Judge Gertner's decision, which dismissed the case and threw out the jury verdict, to the United States Court of Appeals for the First Circuit. Without seeing or reviewing the trial transcript, that court affirmed

Judge Gertner's decision and denied the plaintiff's petition for a rehearing on January 20, 1998.

REASONS FOR GRANTING THE WRIT

In affirming the nontrial judge's decision in this case, the First Circuit noted that said judge had ruled on defendant's motion without benefit of the trial transcript, and the First Circuit saw no difficulty in rendering its opinion without consulting the transcript. The resulting effect of the First Circuit's decision is to totally disregard the factual findings of the jury and the conclusions of law drawn by the trial judge prior to and during the trial and thus deprive plaintiff of his day in court. The First Circuit's decision, in effect, violates plaintiff's right of due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and his jury trial right as preserved by the Seventh Amendment of the United States Constitution, which states that in suits "at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." See, for example, *Ross v. Bernhard*,

396 U.S. 531, 533 (1970), where this Court affirmed that litigants are entitled to a jury trial where legal rights are to be determined. Id., at 533.

What the First Circuit has done in this case is to throw out the jury's findings of fact and substitute its own conclusions as to what happened, which is contrary to established law. This Court has held that "no court is then justified in substituting its conclusions for those of the... jurors." *Tennant v. Peoria & P.U.Ry. Co.*, 321 U.S. 29, 33 (1943). The First Circuit's decision also apparently ignores the Federal Rules of Civil Procedure, Rule 50 and Rule 56, 28 U.S.C.A. as they relate to the issue of whether there are genuine issues of material fact to be resolved by the jury.

Plaintiff here has not only demonstrated that there are material facts in dispute but also has shown that such facts are criticial in determining whether he had a fundamental right to protect himself from potential physical harm -- as afforded to

him by state laws designed to protect the lives, health and comfort all persons (see, for example, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1984) -- and in so protecting himself from harm's way, he need not nor should have been required to contract away that right nor was there a need to consult a collective bargaining agreement to determine whether a person has a right to be free of physical harm or assault.

The state law claims that plaintiff brought were inextricably tied to purely factual matters and did not require an interpretation of a collective-bargaining accord.

This Court has held that despite the existence of a collective-bargaining agreement, "purely factual questions about an employee's conduct and motives do not require interpreting such an agreement's terms." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

That stress on determining the purely factual questions involved in the discharge of plaintiff has been decimated by the nontrial judge and First Circuit in this case, and, as a result, plaintiff's rights have been violated and need to be restored.

CONCLUSION

For all the reasons stated, Petitioner, Albert A. Flibotte, prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

Malcolm Joel Barach, Esq.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 95-1197

ALBERT A. FLIBOTTE, ET AL.,

Plaintiffs, Appellants,

v.

PENNSYLVANIA TRUCK LINES, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Selya and Boudin, Circuit Judges,

and Dowd,* Senior District Judge.

Malcolm J. Barach for appellants.

Regina C. Reardon, with whom Brian P. Crowner and Bray & Reardon, P.C. were on brief, for appellee.

December 10, 1997

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*Of the Northern District of Ohio, sitting by designation.

SELYA, Circuit Judge. Having prevailed before a jury, plaintiff-appellant Albert A. Flibotte saw his apparent victory turn to ashes when the district court entered judgment as a matter of law in favor of defendant-appellee Pennsylvania Truck Lines, Inc. (PTL) on the ground that Flibotte's claims were preempted by section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1994). Flibotte beseeches us to reinstate the jury verdict. We are unable to do so.

I.

Background

Flibotte, a member of Teamsters Local 25, spent almost three decades in PTL's employ. This relationship persisted until PTL terminated him in 1987 for his refusal to participate in a drug testing procedure — a refusal that, under the applicable collective bargaining agreement, "constitute[d] a presumption of intoxication." National Master Freight

Agreement, Art. 35, Sec. 3 (NMFA). Local 25 filed a grievance on Flibotte's behalf pursuant to the NMFA and eventually took the case to binding arbitration. The arbitrator found that Flibotte's ouster did not violate the collective bargaining pact and rejected the grievance.

Flibotte subsequently filed a civil action against PTL in a Massachusetts state court. In addition to a derivative claim for loss of consortium on behalf of Mrs. Flibotte, the complaint contained counts for negligence, invasion of privacy, impairment of civil rights, defamation, negligent infliction of emotional distress, and intentional infliction of emotional distress. Flibotte alleged that PTL notified a group of 37 employees, himself included, to report on March 13, 1987, for the biennial physical examination and drug test required under federal motor carrier safety regulations; that he refused "because his examination was not yet due and because the [designated examination site] was rat-infested"; that,

within one week after he boycotted the scheduled test, he took and passed a drug test administered by his own physician; and that PTL nonetheless discharged him summarily on March 18, 1987. He claimed that in so doing, PTL wrongfully terminated his employment and, in the bargain, breached various state-law duties.

PTL removed the case to the United States District Court for the District of Massachusetts on dual bases (diversity of citizenship and the existence of a federal question). After the usual preliminaries — including the denial of PTL's motion for summary judgment — the case proceeded to trial before Judge Nelson and a jury. During the ensuing eight-day trial, PTL twice moved for judgment as a matter of law on the ground of section 301 preemption. Judge Nelson denied one such motion at the end of the plaintiff's case and the other at the close of all the evidence. In due season, the jury returned a verdict for Flibotte on three counts —

negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress — and awarded him $625,000 in damages.

Like the mills of the gods, the mills of the judiciary sometimes grind exceedingly slow. On November 20, 1991, PTL made a timely motion for judgment as a matter of law, see Fed. R. Civ. P. 50(b), in which it again hawked section 301 preemption. The motion sat unresolved when, in April of 1992, PTL sought the bankruptcy court's protection under Chapter 11, thus triggering an automatic stay of proceedings in the district court. See 11 U.S.C. § 362 (1990). Some seventeen months later, the bankruptcy court confirmed a plan of reorganization. PTL's emergence from the toils of bankruptcy cleared the way for resumption of the district court proceedings. By then, however, Judge Nelson had become disabled and a considerable period of time elapsed before the case was reassigned and a new jurist, Judge

Gertner, took up the outstanding motion. She eventually granted it, provoking this appeal.

Flibotte's objections possess both procedural and substantive dimensions. First, he argues that Judge Gertner erred when she purposed to revisit issues previously decided by Judge Nelson. Second, he assails the merits of her determination that section 301 preempts his state-law claims. We address each of these objections in turn.

II.

Law of the Case

Flibotte's procedural objection has a chameleonic quality. In one iteration, it implies that Judge Gertner improperly made fact-based determinations contrary to those made by her predecessor and in flagrant disregard of the truism that the judge who actually presides over a trial is in a superior position to make such determinations. Without engaging the myriad counter-precedential assumptions that are

essential to this objection, it suffices to say that the legal framework in which motions for judgment as a matter of law exist does not permit courts confronted with such motions to engage in differential factfinding, see Veranda Beach Club Ltd. Partnership v. Western Sur. Co., 936 F 2d 1364, 1383-84 (1st Cir. 1991) (discussing applicable standards), and there is no indication here that Judge Gertner disobeyed these guidelines.

Flibotte's next iteration of his procedural objection is no more rewarding. He asserts that a court is bound by its own precedents, and that, therefore, Judge Gertner was incompetent to revise Judge Nelson's answers to the legal questions posed by the case. This objection is an apparent effort to employ the venerable law of the case doctrine, which states in the large that, unless corrected by an appellate tribunal, a legal decision made at one stage of a civil or criminal case constitutes the law of the case throughout the

pendency of the litigation. See, e.g., United States v. Bell, 988 F.2d 247, 250 (1st Cir. 1993); Abbadessa v. Moore Bus. Forms, Inc., 987 F.2d 18, 22 (1st Cir. 1993).

This principle is of no real assistance to Flibotte. Although temporally distant from each other, Judge Nelson's denial of PTL's motions for summary judgment and for judgment as a matter of law, on the one hand, and Judge Gertner's decision to grant PTL's post-verdict motion for judgment as a matter of law, on the other hand, occurred in the context of a single trial of a single case in a single court, with no intervening appeal. Judge Nelson and Judge Gertner, therefore, play the same institutional role for the purpose of this litigation.

That confluence of judicial identities is dispositive here. "Under the law of the case doctrine, as it is commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and

would work a manifest injustice." Arizona v. California, 460 U.S. 605, 619 n.8 (1983). Moreover, it is perfectly appropriate for a judge to refuse to direct a verdict, permit the jury to consider a case, and thereafter to grant judgment notwithstanding the verdict. See Talbot-Windsor Corp. v. Miller, 309 F.2d 68, 69 (1st Cir. 1962). Accordingly, Judge Nelson would have been free to grant PTL the relief that it sought in its post-verdict motion notwithstanding his previous rulings; and Judge Gertner, who stood in his shoes, was at liberty to do the same. Consequently, Judge Gertner did not arrogate unto herself any undue authority when she entertained PTL's renewed post-verdict motion for judgment as a matter of law and reached a different conclusion than had her co-equal predecessor.

III.

Section 301 Preemption

Having found no procedural glitch, we turn to Judge

Gertner's decision. We review a ruling on a motion for judgment as a matter of law de novo, applying the identical legal standards that constrain the district court. See Colasanto v. Life Ins. Co. of N. Am., 100 F.3d 203, 208 (1st Cir. 1996). Accordingly, "the evidence and all reasonable inferences extractable therefrom must be examined in the light most favorable to the nonmovant and a [judgment as a matter of law] should be granted only when the evidence, viewed from this perspective, is such that reasonable persons could reach but one conclusion." Veranda Beach, 986 F.2d at 1383-84.[1]

---

[1]This case has a peculiar twist. It appears that Judge Gertner, though new to the case, ruled on the motion without the benefit of a trial transcript, and a complete transcript has not been prepared to this date. We need not probe too deeply into the question of which way the absence of this transcript cuts. In most cases, a transcript would form an integral part of the court's decisional calculus on a post-verdict motion for judgment as a matter of law. Here, however, the critical issue — preemption — embodies a pure question of law susceptible to resolution on the face of the pleadings (as supplemented by the collective bargaining agreement). In ruling on the motion for judgment as a matter of law, Judge Gertner hewed to

A.

The Legal Landscape

Read literally, section 301 confers federal court jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." Over the years, however, the Supreme Court has placed a heavy gloss on this language, beginning with its holding that the statute empowers federal courts to craft federal common law reasonably necessary to effectuate the objectives of section 301. See Textile Workers v. Lincoln Mills, 353 U.S. 448, 451 (1957). This substantive authority to declare federal common law soon formed the basis for an emerging jurisprudence of preemption. See

---

this line and did not make any extraneous factual findings or assumptions. Because the judge's analysis and decision did not need to engage any facts derived from trial testimony, this is the rare case in which the absence of a trial transcript is immaterial to the correctness of a ruling on a post-verdict motion for judgment as a matter of law.

Martin v. Shaw's Supermarkets, Inc., 105 F.3d 40, 41-42 (1st Cir.) (recounting development of section 301 preemption), cert. denied, 118 S. Ct. 69 (1997). Today, labor-law preemption casts a relatively wide net. Thus, section 301 preempts a state-law claim "if the resolution of [that] claim depends on the meaning of a collective-bargaining agreement." Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988).

This rule is not without limitations. The Court has cautioned that "purely factual questions about an employee's conduct or an employer's conduct and motives do not require a court to interpret any term of a collective-bargaining agreement." Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 262 (1994) (citation and internal quotation marks omitted). It also has warned that section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." Livadas v. Bradshaw,

512 U.S. 107, 123 (1994). Even so, the basic test remains that prescribed by Lingle and its progeny: that section 301 preempts a state-law claim, whether founded upon the state's positive or common law, if a court, in passing upon the claim, would be required to interpret the collective bargaining agreement. See id. In practice, this test boils down to whether the asserted state-law claim plausibly can be said to depend upon the meaning of one or more provisions within the collective bargaining agreement.

A state-law claim can "depend" on the "meaning" of a collective bargaining agreement in two ways. First, a claim so qualifies if it alleges conduct that arguably constitutes a breach of a duty that arises pursuant to a collective bargaining agreement. See United Steelworkers v. Rawson, 495 U.S. 362, 369 (1990) ("[A] state-law tort action against an employer may be pre-empted by § 301 if the duty to the employee of which the tort is a violation is created by a

collective-bargaining agreement and without existence independent of the agreement."). Second, a claim so qualifies if its resolution arguably hinges upon an interpretation of the collective bargaining agreement. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985) (finding section 301 preemption "when resolution of a state-law claim is substantially dependent upon analysis of the term of an agreement made between the parties in a labor contract"). If a state-law claim depends on the meaning of the collective bargaining agreement in either of these ways — that is, under Rawson's "duty" rubric or under Allis-Chalmers's "interpretation" rubric — it is preempted.

B.

The Merits

At trial, Flibotte prevailed on three state-law claims: negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. Our review of the

pleadings, supplemented by the items that Flibotte included in the record appendix on appeal (such as the collective bargaining agreement) confirms that none of these three claims involves rights that are made non-negotiable under state law and that all of them are preempted by section 301. For clarity's sake, we begin with the negligence claims and then focus on the intentional infliction claim.

1. **Negligence.** If Flibotte's two negligence-based claims are to escape preemption, he must establish that they do not spring from duties imposed by the collective bargaining agreement, but, rather, that PTL has acted "in a way that might violate the duty of reasonable care owed to every person in society." Rawson, 495 U.S. at 371. This would be no mean feat. Even assuming, favorably to Flibotte, that PTL allegedly breached duties derived from a source extrinsic to the collective bargaining agreement, the resolution of the negligence claims nonetheless depends upon the interpretation

of that agreement. Consequently, those claims are preempted under section 301. We explain briefly.

Flibotte's damage claim, as framed in his complaint, links both his economic losses and his emotional distress directly to his termination. In order to prevail on these claims, he must prove that PTL wrongfully discharged him. If PTL acted within its contractual rights in severing the tie, then it could not have breached its general duty of care. It is clear to us that we cannot resolve this question, involving the propriety of Flibotte's firing, without substantial inquiry into the intricacies of the collective bargaining agreement. After all, the appellant concedes that PTL cashiered him because he failed to appear for a scheduled drug test, and the collective bargaining agreement in force here — the NMFA — governs both the frequency of testing, see NMFA Uniform Testing Procedure, Sec. IIB, and the consequences of a failure to take an offered test, see NMFA, Art. 35, Sec. 3. Hence, it is

impossible to determine PTL's negligence without inquiring into its rights and obligations as described by the collective bargaining agreement. This mandatory consultation separates the instant case from those that raise purely factual questions and thus begets section 301 preemption.

If more were needed — and we do not think that it is — we also would note that Flibotte's negligence claims are preempted to the extent that they stem from his contention that the conditions of the requested test were unsanitary and violated the employer's duty to provide a suitable hygienic environment for the examination. This duty derives from the employment relationship as defined in the collective bargaining agreement, and as such, it cannot form the basis for a state-law claim. A plaintiff cannot skirt section 301 preemption by the simple expedient of recharacterizing an employer's substandard performance of duties that devolve upon it pursuant to the terms of the collective bargaining agreement

as a tort. See Rawson, 495 U.S. at 371-72.

2. Intentional Infliction of Emotional Distress.

This leaves only the appellant's claim for intentional infliction of emotional distress. To prevail on that claim, Flibotte had to prove that PTL (1) intended to inflict emotional distress by (2) undertaking actions that were extreme and outrageous, thereby (3) causing emotional distress which (4) was severe. See Wagenmann v. Adams, 829 F.2d 196, 213-14 (1st Cir. 1987); Agis v. Howard Johnson Co., 355 N.E.2d 318-19 (Mass. 1976). Under Massachusetts law, "extreme and outrageous conduct" is behavior that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Foley v. Polaroid Corp., 508 N.E.2d 72, 82 (Mass. 1987).

PTL's rights and obligations under the collective bargaining agreement are obviously central not only to an

inquiry into PTL's intentions, but also to an inquiry into whether PTL conducted itself in a sufficiently outrageous manner to give rise to liability under state tort law. It is a well-settled principle that a party cannot be liable if it does no more than "insist upon [its] legal rights in a permissible way, even though [it] was well aware that such insistence is certain to cause emotional distress." Restatement (Second) of Torts, § 46 cmt. g (1965); see Rush v. United Technologies, 930 F.2d 453, 456 (6th Cir. 1991). If PTL was within its rights to require Flibotte to take a drug test at the designated site and to terminate him when he refused to do so, a claim for intentional infliction of emotional distress cannot lie.[2] Because

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[2] It bears repeating that an arbitrator has already ruled in PTL's favor on the propriety of Flibotte's discharge, and that an historic reason for section 301's extensive preemptive scope was "to ensure that, when developed, the resultant rules would be applied through the grievance procedures agreed upon between unions and management." Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 114 (1st Cir. 1988). This reason remains valid today.

Because the resolution of these issues necessitates examination of the collective bargaining agreement, the claim is preempted. See Allis-Chalmers, 471 U.S. at 213; see also Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 119 (1st Cir. 1988) (upholding section 301 preemption in a drug testing case on the ground, inter alia, that "[o]nly by probing the contours of the [collective bargaining agreement] can one answer whether the [drug testing] program was legitimately implemented").

IV.

Conclusion

We are not without sympathy for Flibotte, who obtained a large verdict many years ago, then was plunged into a longeval legal limbo, and ultimately saw his prized damage award vanish when a new judge came on the scene. It is understandable that Flibotte views the newly arrived judge as the juridical equivalent of the Grinch who stole

Christmas, but in actuality, the judge did no more than her duty. As she recognized, the resolution of each of Flibotte's state-law claims requires an examination of the terms of the collective bargaining agreement and, as a result, the claims are preempted under section 301. Because the district court correctly divined and applied the law, we can go no further.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 95-1197

ALBERT A. FLIBOTTE, ET AL.,

Plaintiffs, Appellants,

v.

PENNSYLVANIA TRUCK LINES, INC.,

Defendant, Appellee.

Before

Selya and Boudin, Circuit Judges,

and Dowd,* Senior District Judge.

ORDER OF COURT

The panel of judges that rendered the decision in this case, having voted to deny the petition for rehearing and, the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court:

PHOEBE MORSE, CLERK

By_____

Administrative Manager

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*Of the Northern District of Ohio, sitting by designation.

[cc: Barach and Murphy; Ms. Reardon; and Mr. Flibotte]

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Order and Memorandum Opinion
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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALBERT A. FLIBOTTE,	)
Plaintiff,	)
v.	)CIVIL ACTION NO.
PENNSYLVANIA TRUCK	)88-2226-NG
LINES, INC.	)
Defendant.	

GERTNER[3], D. J.:

[3]This case was tried before Nelson, J. And a jury. After the trail was completed, the defendant filed a motion for judgment notwithstanding the verdict, and the case was transferred to the undersigned judge. The defendant's current motion raises issues which were consistent themes in its earlier motions to dismiss the complaint and for a directed verdict. As the following analysis indicates, the problems with the plaintiff's case are core problems. The plaintiff has not brought to the Court's attention any trial

MEMORANDUM AND ORDER

I. INTRODUCTION

Defendant Pennsylvania Truck Lines ("PTL"), has filed a motion for judgment notwithstanding the verdict (j.n.o.v.),[4] or alternatively, for a new trial or to reduce the damages imposed by the jury verdict in this matter. Plaintiff Albert A. Flibotte ("Flibotte") has filed an opposition to PTL's motion. For the foregoing reasons, the court **ALLOWS** PTL's motion for judgment as a matter of law.

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testimony which contradicts the Court's conclusions.

[4]Effective December 1, 1991, Fed. R. Civ. P. 50 was amended to change terminology. "Both a motion for directed verdict and a motion for judgment notwithstanding a verdict are now designated as motions for judgment as a matter of law." 9 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2521 (1995). However, the legal standard applied to such motions remains unchanged. See Putnam Resources v. Pateman, 958 F.2d 448, 459 n.7 (1st Cir. 1992). I will use the current terminology for the remainder of this memorandum.

II. FACTUAL AND PROCEDURAL BACKGROUND

Flibotte was an employee of PTL for more than 29 years. During all relevant periods, Flibotte was a member of Teamster's Local 25 ("Local 25") which acted as his collective bargaining agent. ON February 11, 1987, Flibotte and 37 other employees received notice from the company of upcoming physical examinations. The notice stated that the physical examination would include a urine test for the detection of controlled substances and alcohol.[5] The physical examination and drug testing were scheduled for March 13,

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[5]It is undisputed by either party that PTL was required by Department of Transportation ("DOT") Federal Motor Carrier Safety Regulations to perform bi-annual physical examinations on employees who worked as drivers. 49 C.F.R. § 391.45(b) (1987). Flibotte's position fell within this category. Further, the National Master Freight Agreement ("NMFA"), the collective bargaining agreement between PTL and Local 25, authorized PTL, with proper notification, to combine a test for drug use with the DOT physical. NMFA, Article 35, § 3.

1987. Flibotte did not have either examination on that date.[6] PTL considered Flibotte's failure to have the examinations as scheduled to be a refusal to "participate in testing procedure," which "constitute[d] a presumption of intoxication." NMFA, Article 35, § 3. In light of this position, on March 17, 1987, PTL sent Flibotte a notice of termination of employment as outlined in the NMFA. Id.

Local 25 filed a grievance on Flibotte's behalf and pursued the matter through binding arbitration, pursuant to the terms of the NMFA. On July 9, 1987, the arbitrator found that the company had not violated the NMFA in terminating

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[6]The parties maintain differing opinions as to the events of that day. PTL contends that Flibotte refused several requests to take any examination. Flibotte counters that he did not refuse to take the drug test. Rather, he asserts that he refused to take a physical examination in what he described as a "rat-infested" area. Flibotte also argued that he was not due for his next bi-annual physical for several months after March.

Flibotte and denied his grievance.[7]

On August 17, 1988, Flibotte filed this action in Massachusetts Superior Court. The complaint alleged that PTL's request that he take a urine test and physical examination -- and his subsequent termination -- violated his rights under various state law theories.[8] Nothing in the complaint, however, alleged that PTL's actions with respect to the termination itself were taken in anything other than a businesslike manner. PTL subsequently removed the matter

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[7]Flibotte next filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") against Local 25, alleging inadequate representation during the arbitration process. On September 24, 1987 the NLRB Office of General Counsel declined to issue a complaint against the union, and, on October 30, 1987, the NLRB's Office of Appeal affirmed, stating the Flibotte had failed to show that Local 25 acted improperly.

[8]The complaint contained counts for invasion of privacy, impairment of civil rights, negligent slander and libel, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence as well as a loss of consortium claim by Flibotte's wife.

to this court.

On October 30, 1991, after an eight day trial[9], a jury returned a verdict in favor of Flibotte on three counts: intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. The jury awarded damages to Flibotte in the amount of $625,000.00[10] The jury found in favor of PTL on the remaining claims: civil rights violation and defamation. ON November 6, 1991, this Court entered a judgment in favor of Flibotte.

PTL filed this timely motion for judgment as a matter

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[9]At the time of trial, the only remaining defendant was PTL. Claims against the other named defendants, Consolidated Rail Corp. And Concorde, Inc. Were dismissed by this court in orders dated April 8, 1991. (Docket Entry EE 35, 36). Flibotte's privacy claim and his wife's claim for loss of consortium were similarly dismissed.

[10]With pre-judgment interest pursuant to Mass. Gen. L. Ch. 231 § 6B (1985) for tort claims, the total award was $866,609.60.

of law.[11] PTL argues that Flibotte's state law claims were preempted by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 [hereinafter "Section 301"]. PTL alternately contends that the jury verdict should be overturned because there was insufficient evidence to support any of the claims on which Flibotte prevailed.[12]

III. JUDGMENT AS A MATTER OF LAW

A. STANDARD OF REVIEW

Fed. R. Civ. P. 50(b) states in part that "[w]henever a motion for a [judgment as matter of law] made at the close of all the evidence is denied or for any reason is not granted, the

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[11]As required by Fed. R. Civ. P. 50, PTL moved for a judgment as a matter of law in its favor at the close of Flibotte's case as well as at the close of all the evidence. Both motions were denied by this Court.

[12]PTL also argued that the state law claims are barred by the exclusivity provisions of the Massachusetts Worker's Compensation Act, M.G.L. ch. 152, §§ 23-24.

court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."[13] The Standard for granting a motion for judgment as a matter of law renewed after trail is the same as that for granting the motion during the trial. Wartski v. Bedford, 926 F.2d 11, 14 (1st Cir. 1991). Specifically, "the evidence and all reasonable inferences extractable therefrom must be examined in the light most favorable to the nonmovant and '[a judgement as a matter of law] should be granted only when the evidence, viewed from this perspective, is such that reasonable persons could reach but one conclusion.'" Veranda Beach Club Ltd. Partnership v.

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[13]This clause has been interpreted to mean that denial of the motion for judgment as a matter of law made during trial does not preclude the court from deciding the legal issue in favor of the defendant in its renewed motion for judgment as a matter of law made after trail. 9 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 2522 (1995); McAdams v. Matagorda County Appraisal Dist., 798 F.2d 842, 849 n.6 (5th Cir. 1986).

Wester Sur. Co., 936 F.2d 1364, 1383-84 (1st Cir. 1991) (quoting Wagenmann v. Adams, 829 F.2d 198, 200 (1st Cir. 1987)).

"In conducting that exercise, [the trial court] may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence." Wartski, 926 F.2d at 14. For the movant to be successful, there must be a "total failure of evidence to prove [the nonmovant's] case." Mayo v. Schooner Capital Corp., 825 F.2d 566, 568 (1st Cir. 1987) (citation omitted).

B. PREEMPTION

In the instant case, PTL contends that the state law claims on which Flibotte was granted relief by the jury were preempted by federal law, and therefore, should have been foreclosed from the jury's consideration. IN particular, PTL asserts that all of its actions at issue here were authorized, or at least governed, by the NMFA between PTL and Local 25.

Since a determination of the propriety of PTL's actions necessarily requires an interpretation of the NMFA, PTL contends, any claim arising out of them is preempted by Section 301.

The Supreme Court has held that where the resolution of state law claims requires construing the collective bargaining agreement, they are preempted by federal law. Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399, 406 (1988). See also International Phd. Of Elec. Workers v. Heohler, 481 U.S. 851, 855-62 (1987) (citing Allis-Chalmers Corp. V. Lueck, 471 U.S. 202 (1985)); Allis-Chalmers Corp. V. Lueck, 471 U.S. 202, 220 (1985) ("when resolution of a state-law claim is substantially dependent upon analysis of the term of an agreement made between the parties in a labor contract," that claim must be treated as a § 301 action or is preempted by § 301).

In light of these rulings, several courts have held that

tort claims such as those in the present case are preempted by Section 301. See Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988) cert den. 490 U.S. 1107 (1989) (Massachusetts law right to privacy challenge to employer's drug testing policy held preempted by Section 301); Douglas v. American Information Technologies Corp., 877 F.2d 565, 569-73 (7th Cir. 1989). (Illinois state law claim of intentional infliction of emotional distress arising from employee discharge preempted by Section 301); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1149 (9th Cir. 1988) (same result with respect to claim under California law). This is particularly true in the case of claims arising of out the implementation of drug testing policies which were themselves the subject of collective bargaining. See Jackson, supra; Clark v. Newport News Shipbuilding & Dry Dock Co., 937 F.2d 934, 937-938 (4th Cir. 1991); Schlachter-Jones v. General Telephone of California, 936 F.2d 435 441-443 (9th

Cir. 1991); Utility Workers of America v. Southern California Edison Co., 852 F.2d 1083 (9th Cir. 1988) cert. den. 489 U.S. 1078 (1989); Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988); Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1983); Hurst v. Consolidated Freightways, 1990 WL 43934 (M.D.Pa. 1990); Association of Western Pulp and Paper Workers v. Boise Cascade Corp., 644 F.Supp 183 (D.Or. 1986).

Flibotte alleged in his complaint that he suffered emotional distress because PTL wrongfully required him to submit to urinalysis in a rat-infested room as a condition for keeping his job, and terminated him from that job when he refused.[14] No evidence of any other cause of Flibotte's emotional distress was presented at trail. There is no

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[14]Flibotte's claim for intentional infliction of emotional distress was based on the allegation that his termination caused him emotional distress. His claims for negligent infliction of emotional distress and negligence were premised on the allegation that PTL was negligent in permitting the area for administering employee urinalysis to become unclean and rat-infested.

evidence, for example, that Flibotte's distress was caused by exposure to rats while submitting to urinalysis, or by any attempt by PTL to force him to submit to urinalysis through physical or emotional pressure. There is no evidence that Flibotte actually submitted to any test in an unsanitary area or that he incurred emotional distress as a result.

There are two issues and only two issues: the legitimacy of PTL's request that Flibotte submit to urinalysis and physical examination in the first instance, and whether he can be terminated for not complying with this request. As will be clear, both of these issues are governed by the NMFA; as such they are necessarily preempted.

1. Intentional Infliction of Emotional Distress

In order to prevail on a claim for intentional infliction of emotional distress, Flibotte was required to show that PTL intended to inflict emotional distress (or should have known

it was a likely outcome), that PTL's conduct was extreme and outrageous, that PTL's conduct caused emotional distress, and, that the emotional distress was severe. Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976); Nancy P. V. D'Amato, 401 Mass. 516, 520 (1988). In order for conduct to be "extreme and outrageous," it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civil community." Foley v. Polaroid Corp., 400 Mass. 82, 99 (1987).

The plain language of the NMFA authorizes both the urine test and the physical examination, and permits Flibotte's termination under certain conditions. Given these circumstances, one factor which must be considered in evaluating the outrageousness of PTL's conduct is whether it goes beyond what PTL had a right to do under the NMFA. Thus, the evaluation of this claim necessarily requires an

interpretation of the NMFA. See DeCoe v. General Motors, 32 F.3d 212, 219-220 (6th Cir. 1994); Burgos v. Southwestern Bell Telephone Co., 20 F.3d 633, 635-636 (5th Cir. 1994); Douglas v. American Information Technologies Corp., 877 F.2d 565, 573 (7th Cir. 1989); Miller v. AT&T Network Systems, 850 F.2d 453, 550 (9th Cir. 1988). PTL cannot be liable if it did no more than "insist upon [its] legal rights in a permissible way, even though [it] was well aware that such insistence is certain to cause emotional distress." Restatement (Second) of Torts § 46 comment (g) (1965). See Russell v. Salve Regina College, 890 F.2d 484, 487 n.6 (1st Cir. 1989) rev'd on other grounds 490 U.S. 225 (1991); Rush v. United Technologies, 930 F.2d 453, 456 (6th Cir. 1991); Beard v. Carrollton R.R., 893 F.2d 117, 122 (6th Cir. 1989); Therrien v. United Airlines, Inc., 670 F.Supp 1517, 1525 (d.Colo. 1987); Batchelor v. Sears, Roebuck & Co., 574 F.Supp 1480, 1488-89 (E.D.Mich. 1983). Compare Vorvis v.

Southern New England Telephone Co., 821 F.Supp 851, 854-855 (D.Conn. 1993) (finding no preemption where emotional distress claim was based on campaign of harassment by supervisory employees and did not require interpretation of the collective bargaining agreement). Accordingly, Flibotte's intentional infliction of emotional distress claim is preempted by Section 301. Lingle, 486 U.S. at 408-10; Allis-Chalmers, 471 U.S. at 220.

2. Negligent Infliction of Emotional Distress and Negligence

To recover under either of his negligence based claims, Flibotte was required to prove that PTL owed him a duty of care, and that it breached that duty by failing to take reasonable care in the circumstances. Jorgensen v. Mass. Port Authority, 905 F.2d 515, 522 (1st Cir. 1990); Payton v. Abbot Labs, 386 Mass. 540, 552 (1982). Although the plaintiff does not specify how a breach of duty by PTL caused injury to

Flibotte,[15] again the only claimed harm to Flibotte was his termination and the resulting emotional distress.[16] And again, to succeed on these claims, Flibotte must show, at a minimum, that PTL terminated him in a negligent fashion. Because the NMFA explicitly provided for termination upon failure to take a urine test, any finding of a duty on PTL's part not to terminate Flibotte in these circumstances again necessarily required an interpretation of its rights and duties under the NMFA. It was this document which defined Flibotte's right to employment in the first place, and it is this document which defines the reasonableness or negligence on

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[15]The negligent infliction of emotional distress count merely states that "actions were undertaken [by PTL] without regard to the duty of reasonable care," while the negligence count states that PTL breached a duty of care when it "attempted to compel" Flibotte to submit to urinalysis in a rat-infested area.

[16]As explained above, there is no claim of harm arising directly from the allegedly unsanitary conditions in the area in which the urinalysis was to take place.

any decision by PTL to terminate that employment. Because there is no allegation of harm to Flibotte proximately caused by any breach of a non-contractual duty by PTL, Flibotte's claims for negligent infliction of emotional distress and negligence are also preempted by Section 301. Lingle, 486 U.S. at 405-406.[17]

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[17] Flibotte contends that the Supreme Court's decisions in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 413 (1988) and Hawaiian Airlines, Inc. V. Norris, __U.S. __, 114 S.Ct. 2239 (1994) support his argument that his claim is not preempted. In Lingle, the Supreme Court held that Section 301 did not preempt a state law claim preventing discharge in retaliation for filing a worker's compensation claim. The Court specifically found that enforcement of the state law in question did not require an interpretation of a collective bargaining agreement, and therefore was not preempted by Section 301.

Similarly, in Hawaiian Airlines, the court held that the Railway Labor Act did not preempt a state whistle blower protection law, as that law also did not depend on an interpretation of a collective bargaining agreement for its enforcement. 114 S.Ct. At 2247-2251.

Neither of these cases contradicts the analysis above. Unlike the claims in Lingle or Hawaiian Airlines, Flibotte's claims necessarily require an determination of PTL's right to discharge him under the NMFA.

C. FAILURE TO STATE A CLAIM UNDER SECTION 301

Because Flibotte's state law claims are preempted, this action must be dismissed unless there is a basis for a claim under Section 301. Allis-Chalmers, 471 U.S. at 2220. Section 301 provides for judicial enforcement of the terms of collective bargaining agreements. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 561 (1976). However, when the collective bargaining agreement in question contains its own grievance procedure providing for final determination of disputes between the parties, recourse to that procedure is ordinarily the sole remedy available to employees to vindicate their contractual rights. With two exceptions, employees are barred from bringing Section 301 actions in such instances. Hines, 424 U.S. at 562-563; Hayes v. New England Millwork Distributors, Inc., 602 F.2d 15, 18 (1st Cir. 1979).

The first exception to this rule is that an employee

may bring an action directly against the employer if the employer has repudiated the grievnace procedure mandated by the collective bargaining agreement. Hayes, 602 F.2d at 18. That is obviously not the case here, since Flibotte's grievance of his discharge was arbitrated with the full participation of the employer.

The other excepton comes into play in the so-called "hybrid duty of fair representation/Section 301" action. To prevail in a hybrid action, an employee must show that "the union has sole power under the contract to invoke the higher stages of the grievance procedure, and [that] the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process his grievance." Vaca v. Sipes, 386 U.S. 171, 185 (1967); Hayes, 602 F.2d at 18. This exception includes situations where the union processed the grievance, but did so in a dishonest, bad faith or discriminatory fashion. Hines, 424 U.S. at 571.

Flibotte's complaint, however, contains no allegation that his union breached its duty of fair representation in processing his grievance through the arbitration procedure.[18] Moreover, no evidence of such a breach was presented at trial. Accordingly, Flibotte has failed to state a claim under Section 301, and his complaint must be dismissed.[19] Hayes, 602 F.2d at 18.

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[18]Although a hybrid DFR/Section 301 action requires an allegation of union misfeasance, the union is not a necessary party. Fosbroke v. Emerson College, 503 F.Supp 256 257 (D.Mass. 1980); Kaiser v. Local No. 83, 577 F.2d 642 (9th Cir. 1978); Sandobal v. Armour & Co., 429 F.2d 249 (8th Cir. 1970).

[19]Leave to amend the complaint to add an allegation that Local 25 failed to fairly represent Flibotte at the arbitration would be futile in this instance. Flibotte's original complaint against PTL was not filed within the six month statute of limitations governing hybrid actions under Section 301. See DelCostello v. Int'l Broth. Of Teamsters, 462 U.s. 151 (1983). (As noted above, Flibotte did make an unfair representation allegation against Local 25 in an administrative charge filed with the NLRB Office of General Counsel. The General Counsel, however, refused to prosecute Flibotte's charge for lack of evidence.)

IV. CONCLUSION

For the foregoing reasons, PTL's motion for judgment as a matter of law is **ALLOWED** due to preemption of the state law claims. Accordingly, the action is dismissed.

SO ORDERED.

Dated: January 17, 1995 /s/ Nancy Gertner

NANCY GERTNER, D.J.

APPENDIX C

TRANSCRIPT

PARTIAL TRIAL TRANSCRIPT

United States District Court, District of Massachusetts

October 18, 1991

***** Page 6 *****

MR. BARACH:

There is evidence to warrant the jury to find for the plaintiff on the basis that there was a careless or reckless approach on the part of the company and the manner in which they attempted to administer a physical exam in rat infested conditions which resulted, that action, he was damaged which was proximately -- he was damaged or harmed by the loss of his job which then led to emotional distress and anxiety, loss of appetite, sleeplessness, based on his testimony, the testimony of his wife.

The intentional infliction of emotional distress, the jury can find that the company by forcing him to either take the physical examination in a rat infested area and by

attempting to force him to do that, they set in motion an outrageous set of standards -- conduct which a jury could find to be beyond the standard of a civilized community which then subsequently harmed him in terms of his losing his job and suffering, mental suffering, pain and anguish which may not necessarily be measured by necessarily physical injury.

And in terms of negligence, the argument that there is sufficient evidence to show that the company failed by its standard, reasonable standard of care, that standard of care was breached.

Safety. His safety was jeopardized.

***** Page 8 *****

The evidence presented to the jury so far can -- it raises an absolute preponderance of evidence to show that they could find a violation of both the statutes that we set along with the other wrongful actions in addition to which there is no -- also the issue that the jury could find for him

that we met every single element of each of the torts and the violation of the Civil Rights Statute and privacy statute.

And these issues, by the way, go beyond the scope of any issue that might be raised in terms of arbitration. And the jury does have the province to do this. And there is sufficient case law on this.

And the courts have made it very clear that, among other things, when there is deep local concern about the rights of individuals and the rights of the privacy, then the court can allow the jury to go forward.

But in these terms a motion for directed verdict is without foundation because of the evidence. We have corroborating witnesses. We have sufficient evidence to indicate there has been a rat infested area that this man was involved in, the threat to himself and that his privacy was being threatened and that there was negligence, there was infliction of emotional distress, intentional negligence and

there was, in fact, a certain degree of libel and slander, that misrepresentation was demeaning, that he suffered, ...

***** Page 16 *****

MR. BARACH: We presented -

THE COURT: -- to establish --

MR. BARACH: We have established --

THE COURT: I don't want you to recount so tell me what was new.

MR. BARACH: Well, what's new or, I mean, reemphasize that we --

THE COURT: What does that mean, reemphasize?

MR. BARACH: Well, let me clarify. This is not, first of all, a drug test case per se. And, therefore, their preemption concept is not applicable here because what the courts have permitted is individual cases to be allowed to go forward when they deal with issues of rights, individual's

rights, individual -- in terms of civil rights and privacy specifically.

In addition to that, the evidence is here and has the jury has the ability as a matter of -- as the fact finder to clearly find that at this point in time that there has been an impairment, an interference with civil rights. There has been an intrusion of privacy. There has been an injury to this individual person as a direct or proximate result of negligence. There has been libel and slander. We do have showing of publication to a third party, Western Union Telegrams, telecopier machines that go out.

There is a major factual issue here as to whether he took or it not, took the drug test in the sense that the telegrams and the other information communicated say he refused to take the drug test.

The testimony we presented so far clearly indicates that he had not refused to take that drug test. That's a factual

issue. And if it's proven and it's true, then that information is sent out by the company, is, in fact, false. It's defamatory. It damaged his reputation. It says that March 13, 1987 he has suffered sufficient damage and emotional and mental pain and suffering as it applies to all of the different causes of action that we've established here. And that there is sufficient preponderance of the evidence for the jury to go forward at this point.

And we have established a prima facie case to the point that the jury can find for one or more of these causes of actions. Individual torts, individual rights issues are not preempted under the National Labor Relations Board 301 and they can go forward.

And this jury can find for the plaintiff in this case. And there is a sufficient preponderance of evidence, more probable basically than there isn't, that the jury could determine right at this point.

I take strong issue with the fact that we have not established each and every one of the elements of each one of the claims, the causes of actions presented. And we have done it through live testimony, the testimony of various individuals, five in total individuals, and that they have, it's been -- the information has been corroborated -- just a very basic issue of whether he took a drug test was corroborated by the testimony of February 11 by PTL's own clerk who said that he had not taken, you know, that he had said he would take the drug test.

If that's true, if that is true, then any action subsequently taken which led to his being terminated is a harm, a wrong that was done. And that harm that was done was done and could be shown to the jury and has been shown to the jury, you know, as a result of recklessness and not intentional part of the company to single this individual out.

This is not a question of random drug testing. It is

not a question of drug testing. It's a question of a man's right to stand up on March 13, 1987 and say I'm not going to take a physical examination in an area that could intrude on my body and possibly harm me and my family.

And that is an individual right that is guaranteed by the Constitution of the United States, by the Massachusetts Civil Rights Statute. And it cannot be and should not be preempted by any 301 action.

And there is case law that deals with the areas of individual rights particularly in areas like deep local concern cannot take away an individual's right to be protected from grief as a potential harm.

And under the circumstances, this is substantial interference with privacy, the right to be left alone as cited by Justice Holmes in 1890, Justice Cardoza in a 1914 case that talks about protecting one's body from -- as an adult from being tampered with, which set in motion all of the informed

consent forms that patients must today sign in hospital settings throughout the United States.

These are fundamental basic rights that go well beyond any kind of 301 preemption. There is sufficient case law in the opposition papers that have been cited to justify that.

The jury can find as a matter of fact that there has been these intrusions, there has been impairment, the civil rights interference, threats, intimidation are clear cut from the evidence presented by the plaintiff in this case so far.

And the remaining causes of action in terms of defamation of character, libel, slander have been justified and shown to be something the jury can rule on in terms of fact finding for the fact that negligence --

MS. REARDON: Do you think you could keep your voice down.

MR. BARACH: I'm sorry.

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MR. BARACH: Your Honor, I just want to make it clear there is independent -- this case could proceed without any -- without any discussion of the collective bargaining agreement. That was one of the issues that was raised in terms of the admission of evidence. And she just said where very specifically there is exceptions, there is an area of independent law in torts that can --

MS. REARDON: But what is here --

MR. BARACH: Defamation of character is one of them. It's been well documented.

MS. REARDON: It's incorrect. That is incorrect.

THE COURT: Motion denied.

END OF SIDEBAR CONFERENCE.

(Whereupon, the remainder of the proceedings were not transcribed.)